No. 80-196

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

CITY OF SAN DIEGO, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator,

Petitioners,

v.

METROMEDIA, INC., a corporation, doing business as Foster & Kleiser, and PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Respondents.

On Writ Of Certiorari To The Supreme Court Of California

CONDITIONAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The Supreme Court of California has construed 23 U.S.C. Section 131(g), as amended in November 1978, as requiring that just compensation be paid upon the removal of outdoor advertising signs lawfully erected under state law which are not permitted under subsection (c) of Section 131, and were in existence or subject to litigation on November 6, 1978, and located within 660 feet of federal primary or interstate highways, where such signs are caused to be removed by the City of San Diego under its zoning powers.[1]

The questions presented are:

1. Whether such interpretation is correct as applied to signs which are permitted by an agreement between the State of California and the United States Secretary of Transportation pursuant to subsection (d) of Section 131.

2. Whether such interpretation is correct as applied to signs which had become nonconforming uses and thereby illegal under the terms of the San Diego ordinance prior to the November 1978 amendment of Section 131, thereby giving said amendment retrospective effect.

3. Does Section 131, as so construed, violate the Tenth Amendment to the United States Constitution as an unreasonable infringement of the exercise of local police powers.

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[1] The California Supreme Court necessarily interpreted Section 131 because the California Outdoor Advertising Act (California Business & Professions Code, Section 5200 et seq.) requires payment of compensation for sign removal only where required by Section 131. Because of its interpretation of Section 131, the Court held that the State Act preempted the San Diego ordinance to a limited extent.

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The petitioners City of San Diego, the City Council of San Diego, and Voyd Beights, Zoning Administrator, respectfully pray that a writ of certiorari issue to review that portion of the decision of the California Supreme Court entered on April 14, 1980, as modified by order of May 14, 1980, holding that 23 U.S.C. Section 131(g) requires just compensation to be paid upon the removal of certain billboards where caused to be removed pursuant to the City of San Diego under its police powers, the writ to issue only in the event this Court should hear the appeal (or petition for writ of certiorari) in No. _____, at this Term, anticipated to be filed by respondents in this action.

OPINION BELOW

The opinion of the California Supreme Court, reported at 26 Cal.3d 848 (modification at 27 Cal.3d 144d) appears in the appendix hereto (Appendix A).

JURISDICTION

The judgment of the California Supreme Court was entered on April 14, 1980. A timely petition for rehearing was denied and the opinion modified on May 14, 1980 (Appendix C and D). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES INVOLVED

The following provisions involved in this case are set forth in the appendix hereto:

San Diego City Ordinance No. 10795 (New Series)	Appendix E
23 U.S.C. Section 131	Appendix F
Cal. Bus. & Prof. Code Section 5412	Appendix G
23 U.S.C. Section 131(g) & (k) prior to 1978 amendments	Appendix H
Tenth Amendment, U.S. Constitution	Appendix I

STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of the Act of October 22, 1965, 79 Stat. 1028, 23 U.S.C. Section 131, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. Section 2403(a) may be applicable.

STATEMENT OF THE CASE

On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795 (New Series) (Appendix E), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs.

Ordinance No. 10795 requires the abatement and removal of nonconforming signs without compensation upon the expiration of an amortization period. Appendix E-2.

Ordinance No. 10795 is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose the elimination of excessive and confusing signs not related to the premises on which they are located; the elimination of hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the city; to safeguard and enhance property values; and to protect public and private investment in buildings and open spaces. Appendix E-1.

Title 23 U.S.C. Section 131 as amended in 1978 by Public Law 95-599 (Appendix F), and known as the "Highway Beautification Act of 1965," requires that federal-aid highway funds shall be reduced by 10% for any state which does not provide for "effective control," as defined by the Act, of the erection and maintenance of outdoor advertising signs along the interstate and primary system highways. The Act also requires that just compensation shall be paid upon the removal of signs lawfully erected and not permitted under subsection (c) (Section 131(g)), and provides that subject to subsection (g) states may impose stricter limitations (Section 131(k)).

The California "Outdoor Advertising Act" (Cal. Bus. & Prof. Code Section 5200 et seq.) requires payment of just compensation for removal of signs if the federal law requires it (Bus. & Prof. Code Section 5412). Appendix G.

Pursuant to the terms of Section 131(d) the State of California entered into an agreement with the United States Secretary of Transportation in 1968 allowing signs under state regulations in commercial and industrial areas.

All of the signs owned by respondents existing in the City of San Diego are in commercial or industrial areas, some of which are within 660 feet of the interstate or primary system.

The respondent advertising companies filed actions in the Superior Court for the County of San Diego challenging the validity of Ordinance No. 10795. The actions were consolidated and each side brought motions for summary judgment against the other.

The Superior Court denied the petitioners' motion and granted respondents' motion, declaring the ordinance unconstitutional.

The complaints alleged the ordinance to be in conflict with 23 U.S.C. Section 131 and the California Outdoor Advertising Act (C.T. 9, 529). This issue was raised in the motions for summary judgment (C.T. 757 and 583) and the briefs on appeal. The trial court did not pass on this issue, deciding the case on the basis of the police power and the First Amendment instead. The Court of Appeal upheld the trial court concluding that the ordinance constituted an unreasonable exercise of the police power and alternatively that it conflicted with the State Outdoor Advertising Act in certain respects, including the requirement for payment of compensation upon removal under the State and Federal Acts (slip opinion, pp. 16-17).

An opinion dated March 11, 1976, of the Chief Counsel of the Federal Highway Administration concluded that

> The federal act requires payment of just compensation only for removal of signs lawfully erected and that when a sign becomes a nonconforming use under a local zoning ordinance it ceases to be lawfully erected within the meaning of the law.

This opinion was brought to the attention of the California Supreme Court by petitioners in their petition for hearing to that court in the context of interpretation of the effect of the Federal Act on the ordinance.

The California Supreme Court in its initial opinion (Appendix B) filed March 21, 1979, relying in part on this FHA opinion, concluded that the Federal Act did not require compensation where signs had become unlawful under local ordinances which were not enacted to carry out the terms of the Federal Act. Appendix B-26.

On November 6, 1978, subsections (g) and (k) of Section 131 were amended by Public Law 95-599 to require compensation for removal whether or not pursuant to or because of Section 131.

In their petition for rehearing in the California Supreme Court, respondents argued that the Court had relied on the language of Section 131(g) and (k) prior to the 1978 amendments and that the FHA had reversed its position expressed in the March 11, 1976 memorandum stating in a letter of December 5, 1978 that the prior opinion was overruled by the 1978 amendments.

Respondents also brought to the Court's attention a subsequent letter by the FHA, dated March 6, 1979, which concluded that these provisions, as amended, entitled all signs still in existence on November 6, 1978, or which were removed prior to that date but were the subject of litigation pending on that date, to compensation.

In their answer to the petition for rehearing, petitioners raised the issue of giving the 1978 amended provisions (subsections (g) and (k)) retrospective application (at pp. 4 and 5) and raised the issue of the Act, as amended and interpreted by FHA, violating the Tenth Amendment to the United States Constitution due to the effect it would have on local billboard controls under the police powers (at pp. 5-6).

After granting a rehearing, the California Supreme Court filed a new opinion (Appendix A) wherein it interpreted Section 131 as requiring compensation where removal was caused by local ordinance unrelated to the Federal Act and rejected petitioners' arguments as to retrospective effect and violation of the Tenth Amendment. Appendix A-30-31 and Appendix A-33.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of Another State Supreme Court

In the case of *Ackerley Communications, Inc. v. City of Seattle*, 602 P.2d 1177, 1184 (1979), the State Supreme Court of Washington construed 23 U.S.C. Section 131 to exclude from its provisions requiring compensation upon removal, all signs located in commercial and industrial zones which are not governed by an agreement between the State and the United

States Secretary of Transportation. This conclusion was based upon the premise that such signs are not regulated by and are wholly outside the scope of the statute.

The decision below reached a contrary conclusion, stating:

> We must respectfully disagree with the analysis of *Ackerley*. In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement--specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently, it requires compensation when those signs are removed.
>
> Appendix A-30.

2. The Decision Below Raises Important And Recurring Issues Concerning The Effect Of The Federal Statute On State And Local Efforts To Regulate Billboards And On The Possibility Of The Penalty Provisions Being Invoked Against The States

Because of the conflicting interpretations by the decision below and the Washington Supreme Court, uncertainty exists as to whether billboards located within 660 feet of interstate or primary system highways in commercial and industrial areas may be removed pursuant to state or local laws enacted under the police power without compensation.

Cities such as San Diego and Seattle, as well as others, and states and cities which may desire to enact similar laws causing the removal of such billboards may enforce existing laws or

enact such laws only at the risk of the Secretary of Transportation invoking the very substantial penalty of withholding 10% of the normal allocation of federal-aid highway funds to the states. Such a penalty would amount to millions of dollars for the states.

The decision below recognized the importance of the questions presented in stating:

> We reach that conclusion reluctantly, since its effect in this case and in future cases will probably frustrate the original intent of the Highway Beautification Act: to accelerate the removal of billboards and thereby "promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C. § 131(a)).[27]
>
> The 1978 amendments have, in effect, inverted the purpose of the act, making the secondary goal of insuring compensation dominant over the primary goal of encouraging billboard removal.
>
> Appendix A-31-32.

In footnote 27 in the above quote the decision below cited the statement of the Chief Counsel for the Federal Highway Administration as follows:

> The proposed amendment will have the effect of severely limiting local prerogatives to control outdoor advertising by turning the Highway Beautification Act into a statute which protects signs from local land use decisions and ensuring compensation, irrespective of the reason for

> removal. This would represent an unprecedented limitation on local zoning authorities. Traditionally, localities have controlled outdoor advertising, along with other types of non-conforming land uses, under the police power, which would allow removal by amortization.
>
> Appendix A-32.

Traditionally, zoning has been a matter of local concern. *Young v. American Mini Theatres*, 427 U.S. 50, 80, 49 L.Ed.2d 310, 332 (1976); *Village of Belle Terre v. Boras*, 416 U.S. 1, 39 L.Ed.2d 797 (1974).

Although a contention that Section 131 contravenes the Tenth Amendment to the United States Constitution was rejected by the court in *State of Vermont v. Brinegar*, 379 F.Supp. 606 (1974), the changes made in Section 131 by the 1978 amendments give rise to valid contentions of a violation of the Tenth Amendment.

The court in *State of Vermont v. Brinegar, supra*, said at p. 616:

> The standard adopted in *Darby* for measuring the constitutionality of federal legislation in light of the Tenth Amendment is that the federal government has the authority "to resort to all means for the exercise of a granted power which are *appropriate and plainly adopted to the permitted end.*" *United States v. Darby*, 312 U.S. at 124, 61 S.Ct. at 462.
>
> . . . .

> Thus, it appears that the court has postulated a two-tiered test for measuring the constitutionality of federal legislation under the Tenth Amendment:
>
> 1. Is the measure under attack *reasonably related* to a legitimately national end; and, if so,
>
> 2. Does the challenged enactment coerce the state into participating in the federal scheme or does it merely induce the state to act? [Emphasis added.]

This Court has stated that:

> . . . there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority *in that manner.* [Emphasis added.]
>
> *National League of Cities v. Usery*, 426 U.S. 833, 845, 49 L.Ed.2d 245 (1976).

Congress may not wield its power in a fashion that would impair the States' ability to function effectively in a federal system. *Fry v. United States,* 421 U.S. 542, 547, n. 7, 44 L.Ed.2d 363 (1975).

The Federal Act as amended in 1978, and interpreted by the decision below, goes much further in its effect upon local governments than it did in 1974 when analyzed by the court in *State of Vermont v. Brinegar, supra.* As so interpreted, the Act now requires compensation for removal of signs under the local

police power for reasons unrelated to the Act, even where those signs are in commercial and industrial areas and are allowed to remain there under Section 131(d) by agreement between the State and Secretary of Transportation.

Thus, as stated by the decision below, the purpose of the Act has been inverted. Although "effective control" by inducing the states to enact sign controls, including the payment of compensation for removal of signs not permitted under the Act, may have been its original purpose, the amendments have turned the purpose of the Act into one of requiring compensation for removal of signs under the local police powers for reasons unrelated by the Act under threat of withholding federal-aid monies.

Furthermore, when no federal monies are appropriated and none are authorized by the Act to remove signs in commercial and industrial areas because allowed by agreement under the terms of the Act, the stated purpose of the Act is completely frustrated.

Thus, Section 131 does not meet the test set forth in *Brinegar, supra*, in that it is not related to a legitimate national end and does not merely induce the state to act--it coerces it into going beyond the federal scheme in requiring compensation for removals unrelated to the Act.

The conditions imposed are thus arbitrary and not plainly adopted to the permitted end. *Steward Machine Co. v. Davis*, 301 U.S. 548, 80 L.Ed. 1279 (1937).

Furthermore, the decision below is clearly wrong in concluding that signs within commercial and industrial zones which

are allowed to remain pursuant to agreement under Section 131(d) must be compensated upon removal by local ordinance.

Subsection (c) of Section 131 does not exclusively define what signs are permitted as part of the definition of "effective control" and for purposes of subsection (g) requiring compensation for removal of signs not permitted under subsection (c). Signs are also permitted by the terms of subsection (d) in commercial and industrial areas by agreement. Thus, subsection (c) must be read in light of subsection (d).

Such construction was given in *State of Vermont v. Brinegar, supra*, 379 F.Supp. 606, 610, where the court said:

> . . . Subsection (c) of Section 131 does not enumerate the exclusive parameters for defining "effective control." It is significant that Subsection (c) states in pertinent part that "Effective control means that . . . signs, displays and devices [which are covered by the Act] *shall, pursuant to this section*, be limited to [signs of certain classes and descriptions]. . . ." (emphasis supplied). It is of crucial significance that in Subsection (c) of Section 131 Congress used the word "section" in directing the manner in which the signs are to be limited.

Additionally, the decision below was wrong in agreeing with FHA interpretation that the 1978 amendments were to apply retroactively to signs which had not previously been required to be compensated for upon removal. Nothing in the Act sets forth such an intent.

Where there is no clear intent to make legislation apply retrospectively it will not be so construed. *Greene v. United States*, 376 U.S. 149, 169 (1964).

CONCLUSION

If the Court determines probable jurisdiction in the respondents' appeal in No. _____, the Court should review the entire case, including the issues raised herein, and correct the error of the Court below for the foregoing reasons by granting this conditional petition for writ of certiorari.

Dated: August 6, 1980

Respectfully submitted,

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